STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 23, 2014
v	No. 312156 Oakland Circuit Court
MICHAEL TERRY WRIGHT, Defendant-Appellant.	LC No. 2012-241076-FH

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 3 to 40 years' imprisonment for the possession with intent to deliver less than 50 grams of cocaine conviction, 3 to 40 years' imprisonment for the possession with intent to deliver less than 50 grams of heroin conviction, and 3 to 15 years' imprisonment for the possession with intent to deliver marijuana conviction. We affirm.

I. SUFFICIENCY OF EVIDENCE

Defendant contends that insufficient evidence was presented at trial from which a rational trier of fact could find that the essential elements of each of these crimes were proven beyond a reasonable doubt.

This Court reviews a claim of insufficient evidence de novo, "viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt[.]" *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

To convict a defendant of possession with intent to deliver a controlled substance, the prosecution must prove beyond a reasonable doubt "(1) that the recovered substance is a [controlled substance,] (2) the weight of the substance, (3) that the defendant was not authorized

to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992). The elements of possession with intent to deliver marijuana are similar: "(1) defendant knowingly possessed a controlled substance, (2) defendant intended to deliver the substance to someone else, (3) the substance possessed was marijuana," and (4) the substance was in a mixture that weighed less than five kilograms. MCL 333.7401(2)(d)(iii); *People v Williams*, 268 Mich App 416, 419-20; 707 NW2d 624 (2005). In the instant case, defendant only challenges the possession element of the three charged offenses.

Defendant asserts that insufficient evidence was presented to show that he had exclusive control over the home, and his connection to the drugs found in the home was tenuous at best. "The element of knowing possession with intent to deliver has two components: possession and intent." *McGhee*, 268 Mich App at 622. "Proof of actual physical possession is not necessary for a defendant to be found guilty of possessing" a controlled substance. *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010). Instead, possession may be either actual or constructive. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). A person can possess a controlled substance and not be the owner of the recovered substance. *Wolfe*, 440 Mich at 520. "Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Id.*

"Although not in actual possession, a person has constructive possession if he 'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons. . . .'" *Flick*, 487 Mich at 14, quoting *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989) (quotation marks and citation omitted). Dominion or control over the object need not be exclusive. *Flick*, 487 Mich at 14. When analyzing whether the defendant had constructive possession of a controlled substance, "'[t]he essential question is whether the defendant had dominion or control over the controlled substance.'" *Id.*, quoting *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "Possession can be established with circumstantial or direct evidence . . . ." *Flick*, 487 Mich at 14. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of possession. *Nunez*, 242 Mich App at 615-616. Circumstantial evidence that a defendant had dominion or control over property on which a controlled substance is found is sufficient to establish that the defendant constructively possessed the drug. *Id.*

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to show defendant had constructive possession of the cocaine, heroin, and marijuana found in the home located at 31 North Shirley. Defendant was observed at the home on all four occasions that surveillance was conducted. Furthermore, on all four occasions, defendant's brown Ford van was parked in the driveway of the home. Defendant was the only person regularly at the home during the entire investigation, and detective Kurt Bearer observed defendant use keys to open the front door of the home. These same keys were found on defendant when he was apprehended. Additionally, on multiple occasions, the police observed defendant sitting in the van in the driveway of the home, then enter and exit the home after having very brief meetings with people who walked up to the home or van. In the kitchen where the drugs were found, the police also found two credit card receipts bearing defendant's name. One of the receipts had what appeared to be a drug tally sheet on it. In the home, the police also

found a letter and two envelops addressed to defendant. The address on this mail was 784 Emerson Avenue; however, Detective Michael Pankey provided testimony that it is common for someone who is involved with selling drugs to sell the drugs from one location and sleep at another location. In the brown Ford van, the police found a Consumers Energy rebate check made out to defendant for coverage at the 31 North Shirley home. Defendant also has tattoos on his forearms stating, "Shirley Street." The home itself had no beds, clothes, dressers, or anything else that indicated that a person was living there. The police found cocaine, heroin, and marijuana all in plain view in the kitchen of the home. The search was conducted only 20 to 30 minutes after defendant left the home and was subsequently arrested. When the police searched the home soon after defendant's arrest, the police did not find any proof of residency or documentation in the name of any other person other than defendant.

This evidence was sufficient to show that defendant knowingly had the power and intention to exercise dominion and control over the drugs. The evidence presented shows a strong connection between defendant and the home, and no evidence indicated that defendant had any restricted access to the home or the contents inside. It is reasonable for a juror to infer that defendant's continued presence at the home where the drugs were found, the mail, the receipts, and the check bearing his name found in the home and in his van, and the fact that he had keys to the home, provide satisfactory proof that he had dominion and control over the drugs. Furthermore, the fact that defendant was arrested immediately after he left the home where the drugs were found in plain view also supports the inference that defendant knowingly had the power and the intention to exercise dominion or control over the drugs. Therefore, sufficient evidence was presented from which a rational trier of fact could find that defendant constructively possessed the cocaine, heroin, and marijuana.

Furthermore, defendant's contention that the control over the drugs must be exclusive is without merit. As stated above, dominion or control need not be exclusive, and more than one person may have constructive possession of the controlled substance. *Flick*, 487 Mich at 14; *Wolfe*, 440 Mich at 520. Therefore, it is irrelevant that others may have had access to the drugs in question because the prosecution provided sufficient evidence to support the conclusion that defendant himself had constructive possession of the drugs.

II. INEFFECTIVE ASSISTANCE

Defendant next contends that his trial counsel provided ineffective assistance of counsel. When a defendant does not move for a *Ginther*[1] hearing or a new trial on the basis of ineffective assistance of counsel, appellate review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). Here, defendant did not move for a *Ginther* hearing or a new trial on the basis of ineffective assistance of counsel. Therefore, appellate review of this issue is limited to mistakes apparent on the record. *Id.*

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A trial court's findings of fact are reviewed for clear error[,]" and questions of constitutional law are reviewed de novo. *Id.* To prove that defense counsel was ineffective, the defendant must show that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id.* at 81. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy . . . ." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. WAIVER OF PRELIMINARY EXAMINATION

Defendant first asserts that trial counsel was ineffective for deciding to waive the preliminary examination, which prevented defendant from challenging the search warrant that incorrectly stated that defendant had been paroled to his family's house located at 31 North Shirley. Despite this contention, defendant fails to assert why this alleged incorrect statement would be grounds to challenge the validity of the search warrant, and how this was prejudicial to defendant. Defendant bears the burden of establishing the factual predicate for his claim. *Carbin*, 463 Mich at 600. Here, defendant has failed to provide any proof that counsel's decision to waive the preliminary examination fell below an objective standard of reasonableness and that the result of the proceeding would have been different. *Heft*, 299 Mich App at 80-81.

Furthermore, nothing in the record suggests that the search warrant was invalid. In fact, before trial, defendant's counsel and the prosecution acknowledged that the prosecution was only going to introduce evidence relating to the drugs found in the home, and not evidence of any of the controlled drug purchases prior to the execution of the search warrant. The prosecution stated that it would not introduce evidence of "the controlled buys that were done that resulted in the search warrant," unless the defense opened the door to this evidence. It appears that the search warrant was based on a police informant's purchase of drugs from defendant. Therefore, nothing in the record suggests that trial counsel's waiver of the preliminary examination was conduct that fell below an objective standard of reasonableness. *Heft*, 299 Mich App at 80-81.

Further, defendant failed to provide any proof that prejudice occurred. He merely asserts that the waiver of the preliminary examination prevented him from challenging the search warrant. Even if counsel was ineffective for waiving the preliminary examination, the search warrant still could have been challenged in a motion to suppress after the preliminary examination was waived. Therefore, the waiver of the preliminary examination did not prejudice defendant, and this contention fails.

B. FAILURE TO REQUEST AN EVIDENTIARY HEARING

Defendant next asserts that trial counsel was ineffective because he failed to request an evidentiary hearing, which left counsel "flat footed" at trial when the prosecution introduced mail allegedly connecting defendant to the 31 North Shirley home, and introduced evidence that defendant had "Shirley Street" tattooed on his arms. Despite this contention, defendant fails to specify on what grounds trial counsel would have objected to the admission of the letters or tattoos had an evidentiary hearing been conducted. Instead, he makes the purely speculative argument that had an evidentiary hearing been conducted, it is extremely likely that counsel would have known the prosecution was going to use the tattoos to link defendant to the home. Nothing in the record bears this out, so defendant has not met the burden of establishing the factual predicate for his claim. *Carbin*, 463 Mich at 600.

If defendant had established a factual predicate to his claim, he must still overcome a strong presumption that the decisions by his counsel were sound trial strategy. *Sabin*, 242 Mich App at 659. Trial counsel did initially object to the admission of the mail based on hearsay; however, he withdrew the objection because the mail was not addressed to 31 North Shirley, but was instead addressed to 734 Emerson Avenue. During the cross-examination of the detectives, trial counsel's emphasis on this different address appeared to be a part of the defense theory to show that defendant did not live at 31 North Shirley. Therefore, defendant failed to overcome the presumption that trial counsel's failure to request an evidentiary hearing was sound trial strategy, and this claim fails.

C. FAILURE TO INVESTIGATE, CALL WITNESSES, AND PRODUCE EVIDENCE

Defendant also contends that trial counsel was ineffective because he failed to conduct an investigation to find out if anyone else lived, or was staying at, the 31 North Shirley home. Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *Id.* at 493. Here, defendant merely asserts, without any proof or explanation, that counsel was ineffective because he failed to conduct an investigation to find out if anyone else lived or was staying at the home. Because defendant failed to make an offer of proof showing what a more thorough investigation would have uncovered, and why this would have led to a different result at trial, the record does not establish that trial counsel's performance fell below an objective standard of reasonableness or that the representation so prejudiced defendant that he was denied a fair trial. *Heft*, 299 Mich App at 80-81.

Next, defendant contends that trial counsel was ineffective for failing to investigate and call as witnesses two or three neighbors that would have testified that there was no drug activity going on in the home, and a person who was renting the downstairs portion of the home that would have testified that the drugs were his. Beyond defendant's mere assertions, he has not offered any proof to show the identity of these witnesses or what their testimony would have been. Thus, defendant has once again failed to establish the necessary factual predicate for his claim. *Carbin*, 463 Mich at 600.

Even if defendant had offered proof, the record reveals that trial counsel was not informed of these alleged witnesses until the night before trial. On the day of trial, defendant's

trial counsel requested an adjournment because defendant told him the night before trial that he wanted trial counsel to call "people that lived at the house" as witnesses. Trial counsel explained he had met with defendant on three occasions and this was the first time defendant told him that he wanted trial counsel to call these witnesses. However, trial "counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him[,]" *McGhee*, 268 Mich App at 626, and as the trial court stated, there had been ample time for defendant to tell counsel about the witnesses prior to the night before trial. In light of trial counsel's statements on the record about when defendant told him about the potential witnesses and his request for an adjournment after he had been informed, trial counsel's performance was reasonable.

And, even if trial counsel's performance did fall below an objective standard of reasonableness, defendant has not demonstrated prejudice from trial counsel's failure to investigate and call these witnesses. Testimony was presented that defendant was the only one seen at the home regularly, he had keys to open the front and side doors, and defendant was the only person at the home where the drugs were found in plain view. Testimony was also presented that there were no beds, clothes or dressers, and that it appeared as though no one actually lived there. Therefore, even if trial counsel had called these witnesses, nothing in the record suggests that it would have changed the outcome of this case.

Defendant also contends that trial counsel was ineffective for failing to call his mother as a witness, as she would have testified that the mail connecting defendant to the home was found in her van. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), and the failure to call a witness is only considered ineffective assistance if it deprived defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that may have changed the outcome of the trial. *Id.*

Here, defendant fails to offer proof that his mother wanted to testify or would have testified in the manner defendant suggests. And, although at sentencing defendant told the trial court that his mother wanted to testify, in response to defendant's statements, trial counsel stated:

> Your Honor, I would like to say that I did speak to his mother, who's in Court, I did ask her if she would take the stand in her son's defense. I told her that she would most likely be asked questions about whose drugs those were and when I started to cross-examine her, as I'm sure the prosecution would have, she said that she did not want to take the stand.

Thus, the record seems to suggest that trial counsel did ask the mother whether she wanted to testify. In addition, even if defendant's mother did testify that the mail connecting defendant to the home was found in her van, the result of the proceedings would not have been different. *Heft*, 299 Mich App at 80-81. The van was searched by the police after defendant was observed in the home. From the testimony presented by the police, defendant's mother would not have any personal knowledge regarding where the mail was found at the time of the arrest and subsequent search of the home. Therefore, had defendant's mother given this testimony at trial, the result of the proceedings would not have been different.

Defendant also contends that trial counsel was ineffective for failing to call defendant's cousin, who would have testified that he also has a tattoo on his forearm that states, "Shirley Street," which would have mitigated the damaging testimony regarding defendant's tattoo. Once again, defendant fails to offer any proof that his cousin even has such a tattoo, and regarding why this would have been outcome determinative. In fact, at sentencing, trial counsel stated, "I also spoke to my client's cousin, he also did not want to take the stand because he said he did not want to be asked . . . questions [about whose drugs were in the house]." Because nothing in the record suggests that defendant's cousin would have testified to the fact that he has the same tattoo, defendant failed to establish that counsel's performance fell below an objective standard of reasonableness. Furthermore, even if defendant's cousin had testified, this testimony would not have changed the outcome of the proceedings. There was still sufficient evidence presented to show that defendant had a strong connection to the drugs and the home, including the receipts, mail, check, and keys linking defendant to the home, as well as eye witness testimony by the detectives.

Next, defendant contends that trial counsel was ineffective for failing to investigate and present as evidence the deed of the home, tax records, documents from the electric and gas companies, and defendant's parole paperwork, all of which he asserts would have shown that defendant did not live at the 31 North Shirley home. The deed, tax records, utility documents and defendant's parole paperwork are not part of the record. Because review is limited to mistakes apparent on the record, these documents cannot be used to demonstrate ownership of the home on appeal. *Rodgers*, 248 Mich App at 713-714. Furthermore, defendant has not shown that the failure to introduce the documents deprived him of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (opinion by COOPER, J.). Because possession may be found even when the defendant is not the owner of the recovered controlled substances, and possession may be joint, with more than one person actually or constructively possessing the controlled substance, even if evidence was introduced that defendant was not the owner of the home, it would not have resulted in a different outcome. *Wolfe*, 440 Mich at 520; *Heft*, 299 Mich App at 80-81.

D. TRIAL COUNSEL'S STATEMENTS AT SENTENCING

Defendant asserts that trial counsel was ineffective because he made comments at sentencing that compromised defendant's position and resulted in an increase in the minimum sentence imposed. Defendant provides no factual support for this argument, and nothing in the record suggests that the trial court imposed a harsher sentence because of trial counsel's comments at sentencing. In fact, trial counsel asked that defendant be sentenced to the recommended 24 month minimum set forth in the presentence investigation report.

The minimum sentencing guidelines were 5 to 46 months. Before the sentence was imposed, defendant failed to take responsibility and blamed his counsel for being ineffective. The trial court then stated:

> You'd have been better off going on welfare, Sir [sic], if you couldn't support [your daughter], than doing what you did. Because you endangered other people's lives supposedly so that you could raise your daughter. No concern for anybody else, just yourself and your situation.

> You are not the victim here, Sir, so you can stop portraying yourself as a victim or a martyr in this case. And I feel sorry for your little girl.

Hence, the record suggests that the trial court sentenced defendant within the minimum sentencing guidelines range and imposed a harsher sentence than what was recommended because defendant failed to take responsibility for his actions and "portray[ed] himself as a victim." Therefore, counsel's performance was not so deficient that it fell below an objective standard of reasonableness, and there is not a reasonable probability that trial counsel's deficient performance prejudiced the defendant. *Heft*, 299 Mich App at 80-81.

E. TRIAL COUNSEL'S SUSPENDED LAW LICENSE

Lastly, defendant asserts that trial counsel's license to practice law was suspended for operating while intoxicated within a month or two after trial and sentencing, and trial counsel's underlying issues with alcohol may have had an effect on his performance at trial. Because this Court's review is limited to mistakes apparent on the record, any such allegation that trial counsel was suspended after the trial cannot be considered. *Sabin*, 242 Mich App at 659. Defendant offers no factual predicate to show that this subsequent suspension affected trial counsel's ability at trial, or how this prejudiced defendant.

III. DETECTIVE MARK FERGUSON'S PREVIOUS ALLEGED MISCONDUCT

Defendant next contends that after his trial was complete, Detective Ferguson was fired as a result of falsifying a search warrant and lying under oath in other unrelated cases. According to defendant, because he was denied a fair trial, either his convictions should be reversed or this matter should be remanded for a new trial.

Defendant provides no legal authority for his position that he was denied a fair trial. Instead, defendant merely provides a newspaper article on Detective Ferguson's firing, and an unpublished decision in which this Court found that Detective Ferguson failed to read a defendant his *Miranda*[2] rights, as factual support for this assertion. However, with respect to the newspaper article, this is an improper attempt to expand the record on appeal. MCR 7.210(A)(2); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Additionally, the newspaper article and prior case are completely unrelated to this case. Hence, defendant provides no factual or legal support for his claim. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009) (quotation marks and citation omitted).

In any event, Detective Ferguson did not play a central role in the execution of the search warrant, and his testimony at trial was not critical to defendant's convictions. Detective Bearer was the affiant on the search warrant, and was the detective in charge of the investigation.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Detective Ferguson did not conduct any surveillance on the home and none of the evidence presented at trial was found by Detective Ferguson. Furthermore, considering the quantity of drugs found at the home, coupled with Detective Pankey's and Detective Bearer's observations during the course of the surveillance on the home, Detective Ferguson's testimony was not critical to the intent to deliver proofs. Therefore, defendant was not unfairly prejudiced by Detective Ferguson's testimony. *People v Prast*, 114 Mich App 469, 488; 319 NW2d 627 (1982).

Affirmed.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra